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In The Supreme Court of the United States

MAHENDRA SHAH,
a/k/a Mike Shah,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE ADMISSION OF PUTATIVE "OTHER BAD ACTS" EVIDENCE UNDER FED. R. EVID. 404(B) IN DISTRICT COURTS OF THE FOURTH CIRCUIT IS PERMISSIBLE WITHOUT MEETING A THRESHOLD DETERMINATION THAT THE DEFENDANT COMMITTED THE BAD ACTS AND THE EVIDENCE IS RELEVANT TO SOMETHING OTHER THAN THE CRIMINAL PROPENSITY OF THE ACCUSED, AS REQUIRED BY THE MAJORITY OF THE CIRCUITS AND BY HUDDLESTON V. UNITED STATES, 485 U.S. 681 (1988)?

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court below are contained in the caption. There is no party with an interest to disclose pursuant to Rule 29 (6).

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CASES, STATUTES, AND AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS THE WRIT SHOULD ISSUE 6

THE PETITIONER WAS DENIED DUE PROCESS WHEN PUTATIVE 404(B) EVIDENCE WAS ADMITTED, THOUGH THERE WAS NOT EVIDENCE THAT THE PETITIONER COMMITTED THE BAD ACTS AND THOUGH THE BAD ACTS WERE UNRELATED TO THE ISSUES TO BE DECIDED. THE BAD ACTS WERE ADMITTED SOLELY ON THE ISSUE OF CRIMINAL PROPENSITY. THIS PROCESS IS IN CONFLICT BOTH WITH THE MAJORITY OF THE CIRCUITS AND WITH THE GUIDANCE OF THIS COURT PURSUANT TO HUDDLESTON V. UNITED STATES, 485 U.S. 681 (1988). THERE IS A NEED FOR THIS COURT TO CLARIFY THE

PRINCIPLES UNDERLYING THE RULE AND TO RESOLVE THE TENSION AMONG THE CIRCUITS. 6

CONCLUSION 23

APPENDIX A:

Order denying rehearing, United States of America v. Mahendra Shah, United States Court of Appeals for the Fourth Circuit, No. 05-4651, dated July 5, 2006.

APPENDIX B:

Opinion, United States of America v. Mahendra Shah, unreported, United States Court of Appeals for the Fourth Circuit, No. 05-4651, slip opinion dated May 5, 2006.

APPENDIX C:

Judgment, United States of America v. Mahendra Shah, United States District Court for the District of Maryland, No. L-02-560, entered on May 17, 2005.

APPENDIX D:

Fed. R. Evid 404(b).

TABLE OF CASES, STATUTES AND AUTHORITIES

CASES

Chapman v. California,
386 U.S. 18 (1967) 23

Huddleston v. United States,
485 U.S. 681 (1988) 6, 9, 10, 11

Kotteakos v. United States,
328 U.S. 750 (1946) 22

Old Chief v. United States,
519 U.S. 172 (1997) 22

United States v. Afjehei,
869 F.2d 670 (2nd Cir. 1989) 12

United States v. Aguilar-Aranceta,
58 F.3d 796 (1st Cir. 1995) 21

United States v. Anderson,
933 F.2d 1261 (5th Cir. 1991) 11, 12, 20, 22

United States v. Andrini,
685 F.2d 1094 (9th Cir. 1982) 16

United States v. Beasley,
809 F.2d 1273 (7th Cir. 1987) 14, 22

United States v. Beechum,
582 F.2d 898 (5th Cir. 1978) (en banc),
cert. denied, 440 U.S. 920 (1979) 9, 14, 20

United States v. Bradley,
5 F.3d 1317 (9th Cir. 1993) 9, 23

United States v. Brown,
880 F.2d 1012 (9th Cir.1989) 17, 23

United States v. Carillo,
981 F.2d 772 (5th Cir. 1988) 15

United States v. Carroll,
207 F.3d 465 (8th Cir. 2000) 14

United States v. Danzey, 594 F.2d 905 (2nd Cir.),
cert. denied, 441 U.S. 951 (1979) 19

United States v. Dozal,
173 F.3d 787 (10th Cir. 1999) 13

United States v. Fortenberry,
860 F.2d 628 (5th Cir. 1988) 9, 12, 13, 21

United States v. Frankhauser,
80 F.3d 641 (1st Cir. 1996) 17

United States v. Garcia-Orozco,
997 F.2d 1302 (9th Cir. 1993) 9, 13

United States v. Gilan,
967 F.2d 776 (2nd Cir. 1992) 13, 16

United States v. Gilbert,
229 F.3d 15 (1st Cir. 2000) 19, 22

United States v. Gonzalez-Lira,
936 F.2d 184 (5th Cir. 1991) 12, 13

United States v. Guerrero,
650 F.2d 728 (5th Cir. 1981) 15, 18, 23

United States v. Harvey,
845 F.2d 760 (8th Cir. 1988) 10

United States v. Heath,
188 F.3d 916 (7th Cir. 1999) 9, 13

United States v. Hernandez,
975 F.2d 1035 (4th Cir. 1992) 18, 22

United States v. Hill,
953 F.2d 452 (9th Cir.1991) 23

United States v. Himelwright,
42 F.3d 777 (3rd Cir. 1994) 20

United States v. Jemal,
26 F.3d 1267 (3rd Cir. 1994) 10, 16

United States v. Lail,
846 F.2d 1299 (11th Cir. 1988) 14

United States v. LeCompte,
99 F.3d 274 (8th Cir. 1996) 15, 19, 22

United States v. Levario-Quiroz,
854 F.2d 69 (5th Cir. 1988) 15

United States v. Luna,
21 F.3d 874 (9th Cir. 1994) 16

United States v. Lynn,
856 F.2d 430 (1st Cir. 1988) 16

United States v. Merriweather,
78 F.3d 1070 (6th Cir. 1996) 10, 20

United States v. Mothershed,
859 F.2d 585 (8th Cir. 1988) 10, 18

United States v. Neary,
733 F.2d 210 (3rd Cir. 1984) 11, 12, 15, 19, 20

United States v. Nyman,
649 F.2d 208 (4th Cir. 1980) 22

United States v. Perkins,
937 F.2d 1397 (9th Cir. 1991) 16

United States v. Ring,
513 F.2d 1001 (6th Cir. 1975) 19

United States v. Rivera,
837 F.2d 906 (3rd Cir. 1992) 10

United States v. Sampson,
980 F.2d 883 (3rd Cir. 1992) 10, 15, 16

United States v. Shavers,
615 F.2d 266 (5th Cir. 1980) 11

United States v. Simon,
842 F.2d 552 (1st Cir. 1988) 16

United States v. Smith,
103 F.3d 600 (7th Cir. 1996) 14

United States v. Soundingsides,
820 F.2d 1232 (10th Cir. 1987) 19

United States v. Sumner,
119 F.3d 658 (8th Cir. 1997) 19

United States v. Thomas,
58 F.3d 1318 (8th Cir. 1995) 19

United States v. Utter,
97 F.3d 509 (11th Cir. 1996) 11, 17, 21

United States v. Varoudakis,
233 F.3d 113 (1st Cir. 2000) 16, 17, 22

United States v. Veltmann,
6 F.3d 1483 (11th Cir. 1993) 20, 22

United States v. Zelinka,
862 F.2d 92 (1st Cir. 1988) 10

STATUTES & RULES

Fed. R. Evid. 403 . . . . . 2, 6

Fed. R. Evid 404(b) 2

OTHER AUTHORITIES

U.S. Const. amend. V 2

U.S. Const. amend VI. 3

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2006

MAHENDRA SHAH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Mahendra Shah, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit rendered in this matter on May 5, 2006.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported, United States v. Shah, No. 05-4651 (4th Cir., May 5, 2006). The slip opinion is reproduced in Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's judgment was entered on May 5, 2006. The question of whether, under Fed R. Evid 404(b), evidence which did not qualify as "other bad acts" because it was unrelated to the issues before the trial court or because the bad acts could not be shown to have been committed by the defendant, was presented to the Fourth Circuit and decided on the merits. The closely-related question of whether the 404(b) evidence had sufficient probative value to outweigh its prejudicial effect under Fed. R. Evid 403 was also presented to the Fourth Circuit and decided on the merits. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process clause of the Fifth Amendment to the United States Constitution provides in pertinent part that, "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law. . .". U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend VI.

Federal Rule of Evidence 404 is reproduced in Appendix D.

STATEMENT OF THE CASE

Petitioner Mahendra Shah was convicted by a jury of numerous counts relating to the arson of his property, the Shah Industrial Park, which suffered extensive damage in a conflagration on January 6, 2001. While the fact of arson was not questioned, the criminal agency of the Petitioner was highly speculative.

Reduced to its essentials, the government's case described the following arc. Petitioner owned the Shah Industrial Park from the early 1980s. While the Petitioner had no financial problems in general, the income from ownership of the industrial park did not cover the expenses of ownership, and the Petitioner routinely fell behind on expenses related to ownership, including the mortgage and insurance. The Petitioner's maintenance of the industrial park was spotty.

No mortgage payments were made after 1996.

Foreclosure proceedings were not instituted until the summer of 2000 as the property was apparently of little interest to the mortgagee.

There were tiny fires on the premises in 1996 and 1999. The Baltimore City Police and Fire Departments conducted investigations of both events, located no witnesses, identified no suspects and ultimately discovered nothing amiss regarding either one. Neither was reported as an arson, no prosecution was initiated and only the 1999 fire was even labeled as suspicious due to the possible existence of an accelerant. Neither fire resulted in significant damage (only $25.00 for the 1996 fire). No insurance claim was pressed by the Petitioner.

In a notice dated November 30, 2000, the insurer, Travelers, notified Petitioner that the policy on the Shah Industrial Park had been cancelled for nonpayment, effective October 21. This notice did not comport with Maryland law, and Travelers reissued a new notice, dated November 21, along with a bill to extend the coverage until the new termination date, January 8, 2001. This bill was never paid by Petitioner, leaving the Shah Industrial Park obviously uninsured at the end of 2000.

On January 6, 2001, there was a fire at the Shah Industrial Park causing tremendous damage. This fire demonstrably was an arson, as it arose from multiple points of origin and involved the use of accelerants. The police investigation resulted in no witnesses being located, nor was there a suspect identified as having set the fire. (Even by the conclusion of the trial in the case, the Government posits *no* suspect as having set the fire, and–of course–cannot connect the Petitioner to the unknown firesetter. At the same time, it

is absolutely clear because of alibi evidence that Petitioner did not set the fire himself.)

Against this backdrop, the Petitioner was indicted for certain insurance fraud-related issues (wire and bank fraud, money laundering), and for arson and use of arson to commit a felony (18 USC § 844(h)) regarding the causation of this fire. Lacking any evidence of Petitioner's actual involvement in this fire, the government was forced to reach far afield in an attempt to link his questionable business practices with the arson.[1]

After a trial lasting nearly three weeks, the jury returned its verdict on April 28, 2004. Petitioner was convicted of sixteen of twenty of the counts in the indictment. He was sentenced by the district court on May 17, 2005, to a total term of fifteen (15) years. In arriving at this figure, the district court imposed concurrent five (5) year sentences on the various counts of conviction, and then imposed a consecutive ten (10) year sentence as mandated by § 844(h).

Petitioner noted an appeal to the U.S. Court of Appeals for the Fourth Circuit, which affirmed his conviction in an unreported per curiam decision dated May 5, 2006.

Before and at trial, and in his appeal, Petitioner alleged, inter alia, (1) that the district court was obligated to make certain threshold determinations regarding the 404(b) "bad act" evidence which the government sought to

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[1] Petitioner did not challenge these other convictions on appeal, except in a pro forma manner. His appeal, as this Petition, was directed primarily toward the arson-related convictions.

introduce against him, which determinations necessarily must be predicated upon both (2) a showing by the government of the basis for such admissibility, and (3) a showing by the government that Petitioner actually committed the indicated "acts" which (4) concomitantly must be shown to be "bad," and even if such determination was made, that the district court then (5) must make a determination under Fed. R. Evid. 403 regarding the probative value of such evidence. Petitioner contends, as will be demonstrated, infra, none of these five elements were fulfilled by the trial court, nor were they analyzed by the appellate court in its summary disposition of the appeal without providing in its opinion more than a perfunctory acknowledgment of the existence of this issue. This Petition follows.

REASON THE WRIT SHOULD ISSUE

I. THE PETITIONER WAS DENIED DUE PROCESS WHEN PUTATIVE 404(B) EVIDENCE WAS ADMITTED, THOUGH THERE WAS NOT EVIDENCE THAT THE PETITIONER COMMITTED THE BAD ACTS AND THOUGH THE BAD ACTS WERE UNRELATED TO THE ISSUES TO BE DECIDED. THE BAD ACTS WERE ADMITTED SOLELY ON THE ISSUE OF CRIMINAL PROPENSITY. THIS PROCESS IS IN CONFLICT BOTH WITH THE MAJORITY OF THE CIRCUITS AND WITH THE GUIDANCE OF THIS COURT PURSUANT TO HUDDLESTON V. UNITED STATES, 485 U.S. 681 (1988). THERE IS A NEED FOR THIS COURT TO CLARIFY THE PRINCIPLES UNDERLYING THE RULE AND TO RESOLVE THE TENSION AMONG THE CIRCUITS.

A. The failure to meet the threshold for admission pursuant to Rule 404(b).

Federal Rule of Evidence 404(b) permits the admission of extrinsic other bad acts evidence (hereinafter "404(b) evidence") against a defendant only for limited purposes and only under limited circumstances. To be admissible, the 404(b) evidence must meet two basic tests. Initially, it is required to have a form of special relevance to an issue in the case at bar, and then it must be shown not be linked solely to the question of the defendant's character. Preliminary to this analysis, however, the proponent of the 404(b) evidence must provide the basis for the admission of the 404(b) evidence. When ruling upon this, the trial court must also make a threshold determination that the defendant actually committed the extrinsic acts as alleged for the evidence to be admissible. When the requirements of special relevance are met, the trial court may must also find that the evidence meets the Rule 403 balancing test of probative value versus prejudicial effect Petitioner respectfully submits that these clear requirements were not met.

The government alleged a pattern of arson for profit by Petitioner. Two fires in 1999 and 2001, both plainly arson and both entirely unconnected to Petitioner by witnesses or physical evidence, were charged in the indictment as arsons. To establish their status as arsons and to link them to Petitioner, the government sought to introduce as 404(b) evidence a 1996 fire of unknown origin at the Shah Industrial Park. The government admitted that it had no direct evidence that either fire was started by Petitioner; there was no scientific evidence, nor cooperator, codefendant or coconspirator evidence that connected

Petitioner or anyone else to these two arsons. Similarly, no person has ever been charged with setting either of these arsons.

The government's evidence consisted in the first instance of witness Miller, a 75-year-old illiterate who claimed, with a remarkable lack of certainty or clarity, that he had had discussions with Petitioner about burning a building at the Shah Industrial Park. Miller demonstrated he could not remember many of the details, and admitted to but a hazy memory about this or anything else. The entire story is illogical. When Miller stated the discussions took place, the outbuildings involved had been damaged by snow. The replacement cost (or damages) had already been paid to the Petitioner by the insurer. All of this was *after* the date of the 1996 fire, according to the witness, Miller. In short, the government therefore was permitted to bring in evidence that Petitioner asked Miller to burn an uninsured building at the Shah Industrial Park. This was simply evidence of propensity.

Another witness, Brown, a local bar owner, also gave belated evidence relating to the 1996 fire. (Neither he nor Miller had relayed their information about the 1996 fire to anyone until years later, well after the 2001 fire.) Brown claimed Petitioner made an unspecific statement that he "wish[ed] it [the Shah Industrial Park] would just burn up, or burn down." Brown buttressed this testimony with the story that he saw the Petitioner talking to a "drug addict" in the neighborhood prior to the 1996 fire. Brown testified that following the fire, he saw this same drug addict with a scorched head and arm hair. The jury was persuaded to believe that Shah spoke to a drug dealer, hired/engaged him

to set the fire, and the fire-setter was burned in the process. There was no evidence about the nature of the conversation (panhandling?), or the genesis of the addicts burns (freebasing?). The drug addict was never identified, and this whole story was presented as an invitation to believe that Shah had a propensity for burning down a property that he owned.

Another government witness, Titus, admitted that he had seen workers tearing up floors for Petitioner in Shah Industrial Park buildings and using fires built in trash cans to keep warm. Petitioner told Brown he had admonished his workers not to do this.

This Court previously has set out the general test for admissibility of 404(b) evidence in Huddleston v. United States, 485 U.S. 681 (1988). Rule 404(b) evidence must be "probative of a material issue other than character." 485 U.S. at 686, and also must have probative value exceeding its prejudicial effect. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). It also must have temporal proximity to the charged offense, and must be sufficient to support a jury finding that the defendant committed the other act. United States v. Heath, 188 F.3d 916, 920-21 (7th Cir. 1999); United States v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993); United States v. Garcia-Orozco, 997 F.2d 1302, 1303 (9th Cir. 1993); United States v. Bibo-Rodriguez, 922 F.2d 1398, 2400 (9th Cir.), cert. denied, 501 U.S. 1234 (1991).

The proponent of the 404(b) evidence must provide a specific basis for its admission, and the failure of the trial court to require such a showing is an abuse of discretion. United States v. Fortenberry, 860 F.2d 628, 633-34 & nn. 11-

13 (5th Cir. 1988); United States v. Zelinka, 862 F.2d 92, 99 (1st Cir. 1988) (reversal for failure "to articulate any theory of admissibility;" it was not enough that government "merely parrots" language of Rule); United States v. Jemal, 26 F.3d 1267, 1271 (3rd Cir. 1994) (caution warranted regarding admissibility, as government's motive for introducing 404(b) evidence often mixes need for proof of the extrinsic act with desire to impugn defendant's character); United States v. Sampson, 980 F.3d 883, 886 (3rd Cir. 1992)(same). "That rule [404(b)] is not to be used as an excuse or a smokescreen to get other acts evidence before the jury when the Government cannot show that it is necessary to resolve a material issue in dispute." United States v. Rivera, 837 F.2d 906, 912-13 (3rd Cir. 1992).

This showing by the government must be articulated with enough specificity and detail to permit the trial court to analyze the evidence in the context of the case. United States v. Mothershed, 859 F.2d 585, 589 (8th Cir. 1988) (disapproving of "laundry list" approach to analysis of elements). The trial court then must make clear the basis upon which it is permitting the introduction of the evidence. United States v. Harvey, 845 F.2d 760, 762 (8th Cir. 1988) (court must specify basis for admission); United States v. Merriweather, 78 F.3d 1070, 1076-78 (6th Cir. 1996). None of this took place.

B. The two mandatory requirements for the admission of the evidence both were not met.

Initially, it must be demonstrated that there is evidence from which it can be shown whether the extrinsic bad acts actually took place (the first determination). Huddleston v. United States, 485 U.S. at 1499 ("the sale of

the televisions was a 'similar' act only if the televisions were stolen"); United States v. Utter, 97 F.3d 509, 513 (11th Cir. 1996) (in arson prosecution, prior fire not shown to be arson); United States v. Anderson, 933 F.2d 1261, 1271 (5th Cir. 1991) ("Anderson presented insurance reports showing that the causes of the [four previous] fires were accidental or unknown."); United States v. Neary, 733 F.2d 210, 216 (2nd Cir. 1984) (in arson prosecution, no evidence that prior fires were "incendiary in origin"); United States v. Shavers, 615 F.2d 266, 271 (5th Cir. 1980) ("Furthermore, the testimony of [a witness to the prior act] cast doubt as to whether the extrinsic offense was actually committed."). In other words, the prior extrinsic act must both have taken place and must have been "bad." In the trial below, it was not, and could not be, shown that the 1996 fire at the Shah Industrial Park was even an arson. The Baltimore Police Department investigated and could determine no more than that its origin was suspicious – not a legal determination sufficient to underlie admission of evidence. The evidence therefore did not meet the admissibility requirements of the Rule.

Only once the prior act can has been determined to be "bad" can the focus shift to whether or not the defendant was the actor (the second determination). "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred *and* the defendant was the actor." Huddleston v. United States, 485 U.S. at 689, citing United States v. Beechum, 582 F.2d at 912-13 (emphasis supplied). It is not sufficient that there be "unsubstantiated innuendo" regarding a defendant's participation. Huddleston v. United States, 485 U.S. at 689. Defendant's participation in the other act is a "threshold

requirement of relevancy." United States v. Gonzalez-Lira, 936 F.2d 184, 189 (5th Cir. 1991); United States v. Anderson, 933 F.2d at 1271 (in arson prosecution, prior fires must be shown to have been the result of arson, and appellant involved with the arson; neither shown); United States v. Afjehei, 869 F.2d 670, 675 (2nd Cir. 1989) (prior foreign trips by defendant charged with drug smuggling improperly admitted, as no showing that they were in any way narcotics-related; at most a circumstantial showing inadequate to admit); United States v. Fortenberry, 860 F.2d at 632-33 (burden upon government to prove defendant's involvement, yet it could not even prove same person committed extrinsic offenses); United States v. Neary, 733 F.2d at 213 (in arson prosecution, no evidence that prior fires were set by defendant). At the very least, the lack of probable cause even to arrest Appellant in1996 makes clear that this determination cannot be made and the evidence therefore did not meet the requirements of the Rule.

While the defendant's conviction for the prior bad act is not required, United States v. Gonzalez-Lira, 936 F.2d at 189-90, "[h]owever, the Government must at least provide *some evidence* that the defendant committed the prior bad act." Reversal has been mandated when the government sought to introduce evidence of series of attacks, allegedly by the defendant, upon people linked only by their opposition to him (his ex-wife, her attorney and her father), notwithstanding some similarity in the attacks and the charged offense. Absent a showing of defendant's participation in these attacks, they were inadmissible. United States v. Fortenberry, 860 F.2d at 631-33. "The government failed to meet its burden of proving Fortenberry committed

the external offenses." Id. at 633. A prior smuggling attempt did not meet "threshold requirement of relevancy," United States v. Gonzalez-Lira, 936 F.2d at 190, as "[t]he government presented no evidence at all it was Gonzalez who committed that offense." United States v. Garcia-Orozco, 997 F.2d at 1304 (no basis in prior event to determine defendant's knowledge of drugs merely from his presence in car with drugs, when not convicted of this prior offense; at most a circumstantial showing); United States v. Gilan, 967 F.2d 776, 780 (2nd Cir. 1992) (no evidence tying defendant to extrinsic offense; these may be linked by similarities with the charged offenses, but this is not enough as defendant not a part of the link between the former and latter crimes); United States v. Heath, 188 F.3d at 922 (more than mere presence required; this was a purely circumstantial showing); United States v. Dozal, 173 F.3d 787, 794-95 (10th Cir. 1999) (same). Indeed, all that tied Appellant to any of the fires was his ownership of the property, which permitted him to benefit from an insurance claim.

The lack of these necessary predicates to admissibility forms the most significant abuse of discretion by the trial court below, an abuse of discretion which the appellate court simply did not address. If in 1996, witness Brown overheard or witnessed Appellant hire an unknown person, e.g., the "drug addict," to burn his buildings, a jury *might* be permitted to hear about it in order to determine if Appellant burned a building in 1999 or 2001, even if it were not shown that the person participated in the burning. Likewise, if such a person actually had burned the buildings in 1996, the jury *might* be permitted to hear that Appellant was witnessed speaking to that person before the fire, even if

the subject of the conversation was not known. At trial, the jury was provided with neither the solicitation in the first instance, nor the participation in the second instance. Brown was permitted to extrapolate all of this from an at most innocuous encounter and his vivid imagination, and the jury was permitted to make the impermissible inference of propensity upon which to base criminal liability for the 1999 and 2001 fires.

Compounding this error, neither of the courts below addressed the issue of the time between the charged offenses and the act alleged to be 404(b) evidence. Other circuits have noted that "[g]iven enough time, similar crimes will be committed by other people, and the value of the other acts as an earmark is diminished." United States v. Beasley, 809 F.2d 1273, 1277 (7th Cir. 1987); see United States v. Beechum, 582 F.2d at 912.

C. Propensity as an improper touchstone for admission.

What also was lacking was any sort of similarities between the charged offenses and the 404(b) act, so as to suggest a "signature" crime. This requires a careful analysis of the similarities, and differences, and a failure to conduct such an analysis can doom the admission. United States v. Smith, 103 F.3d 600, 603 (7th Cir. 1996) (facts surrounding bank robbery not "sufficiently idiosyncratic"). Allegedly signature facts can occur frequently, and in combination, United States v. Carroll, 207 F.3d 465, 469-70 (8th Cir. 2000), and it often can be the dissimilarities which are most striking. United States v. Lail, 846 F.2d 1299, 1301 (11th Cir. 1988); United States v. Beechum, 582 F.2d 912 n.15 ("modus operandi"). Indeed, when there are the same type of crimes are charged as are sought to be admitted under Rule

404(b), appellate review properly tends to be all the more careful and precise, and usually determines that the extrinsic act evidence cannot be admitted. "In the present case the only similarity between the prior acts and the acts charged against Neary is that there were fires resulting in Neary's collection of insurance." United States v. Neary,733 F.2d at 216-17 (reversed). This language is even more than could be drawn from a fair description of the three fires attributed to Petitioner, since they shared nothing in common, other than his ownership of the same property; incendiary origin (arguably only two of three fires), use of some accelerant (the same two), type of accelerant (no commonality), number of points of origin (no similarity), location within the Shah Industrial Park (none), amount of damage (no similarity), insurance claim made (one).

The question of similarity revolves around the question of whether the offenses share a common characteristic which is a "significant one for the purpose of the inquiry at hand." United States v. Guerrero, 650 F.2d 728, 733 (5th Cir. 1981), citing United States v. Beechum, 582 F.2d 911 (citation omitted); United States v. Levario Quiroz, 854 F.2d 69, 73 (5th Cir. 1988); United States v. Sampson, 980 F.3d at 887. This common characteristic must be common between the crimes (prior act and charged offense), and it is not enough that this simply is common in or generic to the context of this type of crime, e.g., arson. United States v. LeCompte, 99 F.3d 274, 279 (8th Cir. 1996) (the similar prior abuse and charged offense "reflect misconduct common to all too many child sex offenders."); United States v. Carillo, 981 F.2d 772, 775 (5th Cir. 1988).

What is required is that the "characteristics of the other crime or act [must] be 'sufficiently distinctive to warrant an inference that the person who committed the act also committed the offense at issue;'" United States v. Perkins, 937 F.2d 1397, 1400 (9th Cir. 1991), quoting United States v. Andrini, 685 F.2d 1094, 1097 (9th Cir. 1982); or whether "those common features are so generic that such an inference cannot be drawn;" United States v. Luna, 21 F.3d 874, 881 (9th Cir. 1994), citing United States v. Perkins, 937 F.2d at 1400; United States v. Gilan, 967 F.2d at 779-80 (similarities outweighed by lack of link of defendant to extrinsic offense). "If the government offers prior offense evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed drug offenses before, he is more likely to have committed this one." United States v. Sampson, 980 F.3d at 887.

In a commercial arson prosecution, evidence of a prior fire allegedly set to collect insurance on a car was excluded, as "no evidence suggests that 'a continuing or connected scheme' linked" the two fires. United States v. Varoudakis, 233 F.3d at 119; United States v. Jemal, 26 F.3d at 1272; United States v. Lynn, 856 F.2d 430, 435 (1st Cir. 1988) ("no evidence suggests a continuing or connected scheme of marijuana importation."). As noted by a leading jurist, caution is required for "[a]lmost any excuse or far-fetched theory" will be used under Rule 404(b) to seek admission of "marginally admissible" evidence. United States v. Simon, 842 F.2d 552, 556 (1st Cir. 1988) (Torruella, J., concurring); United States v. Sampson, 980 F.2d at 886 ("Although the government will hardly admit it, the reasons

proffered to admit prior bad act evidence may often be potemkin village.").

The government presupposed a common scheme underlying the fires, i.e., that they were set to permit insurance claims. The government, however, could not provide evidence to establish this.

The government claimed that the 1996 fire demonstrated motive in the charged crimes in 1999 and 2001. However, the 404(b) evidence must show a motive to commit the crime charged, relating thereby to Petitioner's identity as the actor, and "not simply a propensity to engage in criminal activity." United States v. Brown, 880 F.2d 1012, 1015 (9th Cir.1989); United States v. Varoudakis, 233 F.3d at 120 (use of motive to "smuggle forbidden evidence of propensity to jury"). Indeed, as proof of motive, the use of 404(b) evidence of a prior fire as circumstantial evidence of a motive to commit the charged arson is impermissible, as "[i]t involves an inference of propensity as 'a necessary link in the inferential chain.' Put most simply, the government argues that Varoudakis's commission of the arson fire in response to financial stress makes it more likely that he committed the restaurant arson in response to financial stress." Id., quoting United States v. Frankhauser, 80 F.3d 641, 648 (1st Cir. 1996). United States v. Utter, 97 F.3d at 514 (prior fire excluded from arson prosecution; government rationale was financial stress). "This is the type of character and propensity evidence prohibited by Rule 404(b)." Id. As discussed, supra, and as argued in the government's appellate brief, it plainly urged the consideration of the motive of insurance fraud, although only one of the three fires resulted in an insurance claim. Any allegation that these prior minor

fires *would have* resulted in an insurance claim had they been of greater extent is mere and unsupported supposition, and cannot support the admission of 404(b) evidence. This argument falls of its own weight.

Similarly, the 404(b) evidence is of no use in demonstrating intent. It may be no more than "mere conjecture" whether the defendant intended or participated in a charged crime, based upon evidence of involvement in a prior similar crime, and this likely will be of "no relevance – other than as proof of propensity," and whatever relevance it might have would be only slight when compared with the "devastatingly prejudicial impact of such evidence in the mind of a jury." United States v. Mothershed, 859 F.2d at 590.

For 404(b) evidence to be relevant on the issue of intent, the actor must have the same state of mind for both the prior act and the charged offense, United States v. Guerrero, 650 F.2d at 733, and nothing in the proffered evidence would permit jury to infer intent on part of Petitioner. Where the defendant denies his very involvement, the use of prior bad acts evidence "must be considered with meticulous regard for the facts of each case," and the probative value of prior bad acts evidence is significantly less when the defendant makes such a claim of non-involvement in the charged offense. United States v. Hernandez, 975 F.2d 1035, 1040 (4th Cir. 1992). The 1996 fire could show nothing about Petitioner relative to the later fires, except the improperly grounded idea of propensity on his part.

This understanding is supported when it is remembered that intent is not an issue "when the defendant

specifically denies only the criminal act," United States v. Thomas, 58 F.3d 1318, 1321-22 (8th Cir. 1995), and 404(b) evidence is not admissible on that issue, since, for example, "[t]he evidence was clear that whoever set the fire in the defendant's restaurant was an arsonist," United States v. Neary, 733 F.2d at 216-17. See United States v. LeCompte, 99 F.3d at 279. Nor is intent a genuinely contested issue, notwithstanding defendant's plea of not guilty, where it is not raised as a defense, United States v. Thomas, 58 F.3d at 1321-22 (and 404(b) evidence therefore inadmissible), as "[p]roof of intent may be inferable from the act itself," United States v. Danzey, 594 F.2d 905, 914, (2nd Cir.), cert. denied, 441 U.S. 951 (1979); United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997) ("if [defendant] Sumner actually performed the alleged acts against [victim] D.D. his criminal sexual intent could not be seriously questioned"); United States v. Soundingsides, 820 F.2d 1232, 1237 (10th Cir. 1987) (no issue of malice aforethought where defendant denied involvement in murder); United States v. Ring, 513 F.2d 1001, 1007 (6th Cir. 1975) (intent not a genuinely contested issue). There was no attempt at trial by Petitioner to contest whether either the 1999 or 2001 fires were arsons, and the intent of the arsonist was not an issue.

D. The minimal probative value was outweighed by an immense prejudicial effect.

Even when evidence passes scrutiny under Rule 404(b), it then must be analyzed for relevance under Rule 403, and must meet the further test of being shown to be specifically probative to the charged offenses while likewise not unduly prejudicial to defendant. United States v. Gilbert, 229 F.3d 15, 26 (1st Cir. 2000) (jury could not consider

404(b) evidence "without drawing a forbidden inference of criminal propensity"); United States v. Merriweather, 78 F.3d at 1077 (trial court must determine if the evidence is relevant under Rule 403); United States v. Veltmann, 6 F.3d 1483, 1500 (11th Cir. 1993) (Rule 403 function is to exclude matter of "'scant or cumulative probative force, dragged in for the sake of its prejudicial effect'"). United States v. Himelwright, 42 F.3d 777, 784 (3d Cir. 1994) (Rule 403 analysis showed prejudice "substantially outweighed" probative value).

> [T]he more closely the extrinsic offense resembles the charged offense, the greater the prejudice to the defendant. The likelihood that the jury will convict the defendant because he is the kind of person who commits this particular type of crime or because he was not punished for the extrinsic offense increases with the increasing likeness of the offense.

United States v. Beechum, 582 F.2d 915 n.20.

> No matter what limiting instruction might be given, the evidence presented a high risk that the jury might nevertheless improperly infer from the occurrence of several fires that the defendant probably set the one in the indictment.

United States v. Neary, 733 F.2d at 217; United States v. Anderson, 933 F.2d at 1271-72 (also a commercial arson case).

In United States v. Aguilar-Aranceta, 58 F.3d 796, 800-01 (1st Cir. 1995), involving a prosecution on nearly identical circumstances as on prior conviction for drug importation, the First Circuit reversed, as the instant conviction was obtained solely upon the basis of a prior conviction. The court held that there could have been no conviction in the charged offense on facts which were insufficient to convict the defendant without that prior conviction being admitted. Id.; United States v. Utter, 97 F.3d at 513 (in an entirely circumstantial arson case, other fire evidence was irrelevant under 403 analysis). The prejudicial effect of evidence of prior attacks on individuals, allegedly made by defendant, which were similar to charged offenses, has been seen to tip the Rule 403 scale against admission. United States v. Fortenberry, 860 F.2d at 631-33.

Put in another way, there was evidence that in 1996 Brown observed Appellant speak to a person he did not know, about an unknown subject. Brown presumed the person to be a drug addict, without any basis for such a belief. Brown did not witness this unknown person do anything related in any way to the fire: neither preparation, nor action nor flight, nor did Brown see this person on or near the Shah Industrial Park at any point. At some indeterminate later time, Brown allegedly observed the person apparently to be singed, though he did not ask this person about this to confirm his hunch. At no time did Brown act upon this supposition, nor did he relay it to anyone, until five years later when he told the police about this, after the patently incendiary 2001 conflagration.

At trial, this supposition of an incendiary fire in 1996 supposedly arranged by Appellant was elevated to the level

of 404(b) evidence, and admitted in lieu of actual evidence to help show that Appellant may well have burned his property both in 1999 and in 2001. This evidentiary situation was put into a nutshell by the Seventh Circuit. "We are not dealing with transparently admissible evidence. Some seems almost transparently inadmissible." United States v. Beasley, 809 F.2d at 1280; see Old Chief v. United States, 519 U.S. 172, 180-81 (1997) (defining "unfair prejudice"). "The evidence, after all, consists almost entirely of allegations made by a hostile witness months after the event in question." United States v. Gilbert, 229 F.3d at 23.

The 404(b) evidence provided a crucial part of a weak circumstantial case, bereft of any physical or other evidence linking Appellant to any arson. United States v. Veltmann, 6 F.3d at 1501 (extremely close case built solely on circumstantial evidence). The 404(b) evidence supported the unsubstantiated and claims of government witnesses made years later. Such error cannot be harmless where the evidence was by no means overwhelming, where witness credibility was crucial, and where testimony in the record contradicted the witnesses. United States v. LeCompte, 99 F.3d at 279; United States v. Anderson, 933 F.2d at 1271-72 (404(b) witness shown to have perjured himself). Absent the 404(b) evidence, it cannot be said that the verdict would have been the same, for it cannot be said that the jury would have viewed the government witnesses in the same light. United States v. Varoudakis, 233 F.3d at 126 (government case largely circumstantial); United States v. Hernandez, 975 F.2d at 1041-42; United States v. Nyman, 649 F.2d 208, 211-12 (4th Cir. 1980), citing Kotteakos v. United States, 328 U.S. 750, 765 (1946) (reversal due to closeness of evidence);

United States v. Guerrero, 650 F.2d at 736 (not harmless). Where the improperly admitted evidence was of "minuscule probative value," it cannot be seen to have been harmless. United States v. Bradley, 5 F.3d at 1322; United States v. Hill, 953 F.2d 452, 459 (9th Cir. 1991) (in a "close case" as here, "the harmless error rule is difficult to apply."); United States v. Brown, 880 F.2d at 1016.

The theory of arson for insurance purposes at the Shah Industrial Park was an orphan, when taken in the form of unrelated and markedly different fires in 1999 and 2001, linked solely by their location. An orphan, that is, until the 1996 fire "evidence" stood in as its foster parent and adopted Petitioner as the agent of causation. Therefore, it cannot be said that the error was harmless beyond a reasonable doubt, and reversal of the convictions of Appellant in the arsons and related counts is the only appropriate remedial measure. See Chapman v. California, 386 U.S. 18, 24 (1967) (error must be harmless beyond a reasonable doubt).

Petitioner prays the issuance of the writ.

CONCLUSION

The admission at trial of the contested and merely circumstantial 404(b) evidence served to rehabilitate a weak and solely circumstantial case against Petitioner. Absent the admission of this 404(b) propensity evidence, which manifestly could serve no other purpose in the context of the government's case, the prosecution of Petitioner was founded on no more than his ownership of a commercial property which was the subject of a fire and a pointless insurance claim. The evidence did not meet the standards under Rule 404(b), and likewise could not survive scrutiny

under the Rule 403 test, as it was of no probative value when juxtaposed with its prejudicial effect. Its introduction therefore was violative of Petitioner's due process rights as guaranteed by the Fifth Amendment, and served to deny him complete and unfettered assistance of counsel as ensured by the Sixth Amendment.

The trial and appellate courts failed both to address this complex and multifaceted issue in any meaningful way, and similarly failed to follow the guidance of this Court in Huddleston and the considerable authority fo the circuits following in its wake. This Court should intervene and provide needed clarity by amalgamating the considerable appellate authority into a clear standard which all of the circuits might implement in the future.

The petition for a writ of certiorari should be granted.

This the 23rd day of October, 2006.

Respectfully submitted,

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No. (2) 06-578 Oct 23, 2006

In The
Supreme Court of the United States

MAHENDRA SHAH,
a/k/a Mike Shah,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed July 25, 2006

No. 05-4651
CR-02-560

United States of America,

Plaintiff-Appellee,

v.

Mahendra Shah, a/k./a Mike Shah,

Defendant-Appellant.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Niemeyer, and Judge Motz.

For the Court,

/s/ Patricia S. Connor
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed July 25, 2006

No. 05-4651

United States of America,

Plaintiff-Appellee,

v.

Mahendra Shah, a/k./a Mike Shah,

Defendant-Appellant.

PER CURIAM:

Mahendra Shah appeals his convictions and 180-month sentence imposed for eight counts of mail fraud, in violation of 18 U.S.C. § 1341 (2000); one count of wire fraud, in violation of 18 U.S.C. § 1343 (2000); two counts of arson, in violation of 18 U.S.C. § 844(I), (h) (2000); four counts of engaging in a money transaction in criminally derived property, in violation of 18 U.S.C. § 1957(a) (2000); and one count of use of a fire to commit a felony, in violation of 18 U.S.C. § 844(h) (2000). Finding no error, we affirm.

Shah asserts the district court abused its discretion when it admitted evidence under Fed. R. Evid. 404(b) of Shah's involvement in a 1996 fire, an event for which Shah filed no insurance claim, and therefore was purportedly inadmissible to prove a plan to defraud his insurance company. Evidence of prior acts is admissible under Fed. R. Evid. 404(b) and Fed. R. Evid. 403 if the evidence is: (1)

relevant to an issue other than the general character of the defendant, (2) necessary, (3) reliable, and (4) if the probative value of the evidence is not substantially outweighed by its prejudicial effect. United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997). The evidence at issue here, the 1996 fire was critical to establish Shah's plan to defraud, and satisfies the criteria enumerated in Queen. We therefore find the district court did not abuse its discretion in admitting this evidence.

Shah next alleges the evidence was insufficient to support his convictions. A jury's verdict must be upheld on appeal if there is substantial evidence, taking the view most favorable to the government, to support it. Glasser v. United States, 315 U.S. 60, 80 (1942). Substantial evidence is defined as "that evidence which a 'reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" United States v. Newsome, 322 F.3d 328, 333 (4th Cir. 2003) (citation omitted). We review both direct and circumstantial evidence and permit "the government the benefit of all reasonable inferences from the facts proven to those sought to be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). Construing all inferences in favor of the Government, we find the evidence against Shah was abundant.

Shah finally argues that his statutorily-mandated sentence violated United States v. Booker, 543 U.S. 220 (2005). Shah contends that his sentence should be remanded as Booker vests sentencing discretion in the trial court and causes the factors in 18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2005) to trump all mandatory statutes. This argument lacks merit. See United States v. Green, 436 F.3d 449, 456 n* (4th Cir. 2006) (citing 28 U.S.C. § 3553(c) (2000)); United States v. Robinson, 404 F.3d 850, 862 (4th Cir. 2005) (acknowledging, in the context of determining whether a sentence is reasonable, that "[t]he statutory limits for both

maximum and minimum sentences must be honored except as statute otherwise authorizes").

We therefore affirm Shah's convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
District of Maryland

United States of America,

v.

Mahendra Harilal Shah, a/k/a Mike Shah

Case No.: L-02-0560
USM No.: 40589-037

JUDGMENT IN A CRIMINAL CASE

The Defendant:

was found guilty on count(s)
1,3,4,5,6,7,8,11,12,13,14,15,16,17,19 and 20 after a plea of not guilty.

18U.S.C.§1341 - Mail Fraud - 04/01/99 - 1 of indictment
18U.S.C.§844(i) - Arson - 12/12/99 - 3 of indictment
18U.S.C.§1341 - Mail Fraud - 9/18/00 - 4 of indictment
18U.S.C.§1341 - Mail Fraud - 9/29/00 - 5 of indictment

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by U.S. v. Booker, 125 S. Ct. 738 (2005).

The defendant has been found not guilty on counts 9, 10 and 18.

Count(s) 2 of Indictment was dismissed by the court during trial.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Judgment: May 17, 2005

/s/Benson Everett Legg	June 16, 2005
Chief U. S. District Judge	Date

ADDITIONAL COUNTS OF CONVICTION

18U.S.C.§1341 - Mail Fraud - 10/18/00 - 6 of Indictment
18U.S.C.§1341 - Mail Fraud - 11/09/00 - 7 of Indictment
18U.S.C.§1341 - Mail Fraud - 11/29/00 - 8 of Indictment
18U.S.C.§1341 - Wire Fraud - 01/07/01 - 11 of Indictment
18U.S.C.§1341 - Mail Fraud - 01/19/01 - 12 of Indictment
18U.S.C.§1341 - Mail Fraud - 03/12/01 - 13 of Indictment
18U.S.C.§1957(a) - Engaging in Monetary Transaction - 9/22/00 - 14 of Indictment
18U.S.C.§1957(a) - Engaging in Monetary Transaction - 10/03/00 - 15 of Indictment
18U.S.C.§1957(a) - Engaging in Monetary Transaction - 10/25/00 - 16 of Indictment
18U.S.C.§1957(a) - Engaging in Monetary Transaction - 11/21/00 - 17 of Indictment
18U.S.C.§844(I) - Arson - 01/06/01 - 19 of Indictment
18U.S.C.§844(h) - Use of Firearm to commit a felony - 01/06/01 - 20 of Indictment

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of imprisonment of one hundred twenty (120) months as to Ct. 20; Sixty (60) months as to each of Counts 3 and 19, concurrent with each other and consecutive to Count 20; and sixty (60) months as to each of Counts 1,4,5,6,7,8,11,12,13, 14,15,16 and 17, concurrent with each other and Counts 3 and 19 and Count 20, for a total term of imprisonment of one hundred and eighty (180) months.

The Court makes the following recommendations to the Bureau of Prisons: 1. That the defendant be given appropriate credit for time already served in Federal custody on these convictions dating from April 28, 2004 to May 17, 2005, the date this sentence was imposed; and 2. That the inmate be placed in a facility consistent with his security level that is as close as possible to: the Mid-Atlantic Region.

The defendant is remanded to the custody of the United States Marshal.

Fed. R. Evid. 404(b)

Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.